

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

EDWARD FRANKLIN HULBERT,

Defendant-Appellee.

UNPUBLISHED

October 26, 2006

No. 262505

Livingston Circuit Court

LC No. 03-103676-FH

Before: Whitbeck, C.J., and Saad and Schuette, JJ.

MEMORANDUM.

In this prosecutor's appeal, plaintiff appeals by delayed leave granted from the circuit court's order sentencing defendant, as a probation violator, to continued probation rather than a term of imprisonment as recommended by the sentencing guidelines. We vacate defendant's sentence and remand for resentencing. This appeal is being decided without oral argument in accordance with MCR 7.214(E).

In 2003, defendant pleaded guilty to assault with intent to commit criminal sexual penetration, MCL 750.520g(1), and contributing to the delinquency of a minor, MCL 750.145. The trial court imposed a term of sixty month's probation.

In January 2005, however, defendant returned to court and admitted that he violated his probation when he was terminated from sexual offender treatment and because he failed to maintain full-time employment. The trial court observed that, with regard to the sex offender treatment, defendant "was disrespectful to the treating therapist," and swore at a fellow group member. Accordingly, defendant "was asked to leave and was told that he was not welcome back to the group." The court had before it a guidelines recommendation of a minimum sentence of between twenty-nine and fifty-seven months, but the court chose instead to reinstate probation.

The departure evaluation indicates that the trial court departed downward from the guidelines because, notwithstanding his probation violation, defendant was otherwise compliant, he had no positive tests, he had no further police contact and, as of the time the evaluation was prepared, he maintained employment and paid restitution. Plaintiff argues that that these reasons do not justify the departure. We agree.

To depart from the guidelines, a sentencing court must state on the record its reasons for the departure, and may deviate for only a “substantial and compelling reason” MCL 769.34(3). See also *People v Babcock*, 469 Mich 247, 255-256, 272; 666 NW2d 231 (2003). Substantial and compelling reasons are those that keenly or irresistibly grab the attention, and should arise in only exceptional cases. *Id.* at 257-258.

While the trial judge acknowledged that defendant violated his probation, he reasoned that defendant complied with other conditions of probation. However, to the extent that a probationer complies with the conditions of probation, he or she is merely fulfilling a duty that was legally imposed as an alternative to a term of imprisonment. If a violator otherwise complies with conditions of probation, it does not amount to extraordinary circumstances that keenly grab the attention. Accordingly, the trial court erred when it departed from the guidelines for reasons that were not substantial and compelling.

Vacated and remanded for resentencing consistent with this opinion. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ Henry William Saad
/s/ Bill Schuette